TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 96

BERNARD SCHEIF, PLAINTIFF IN ERROR,

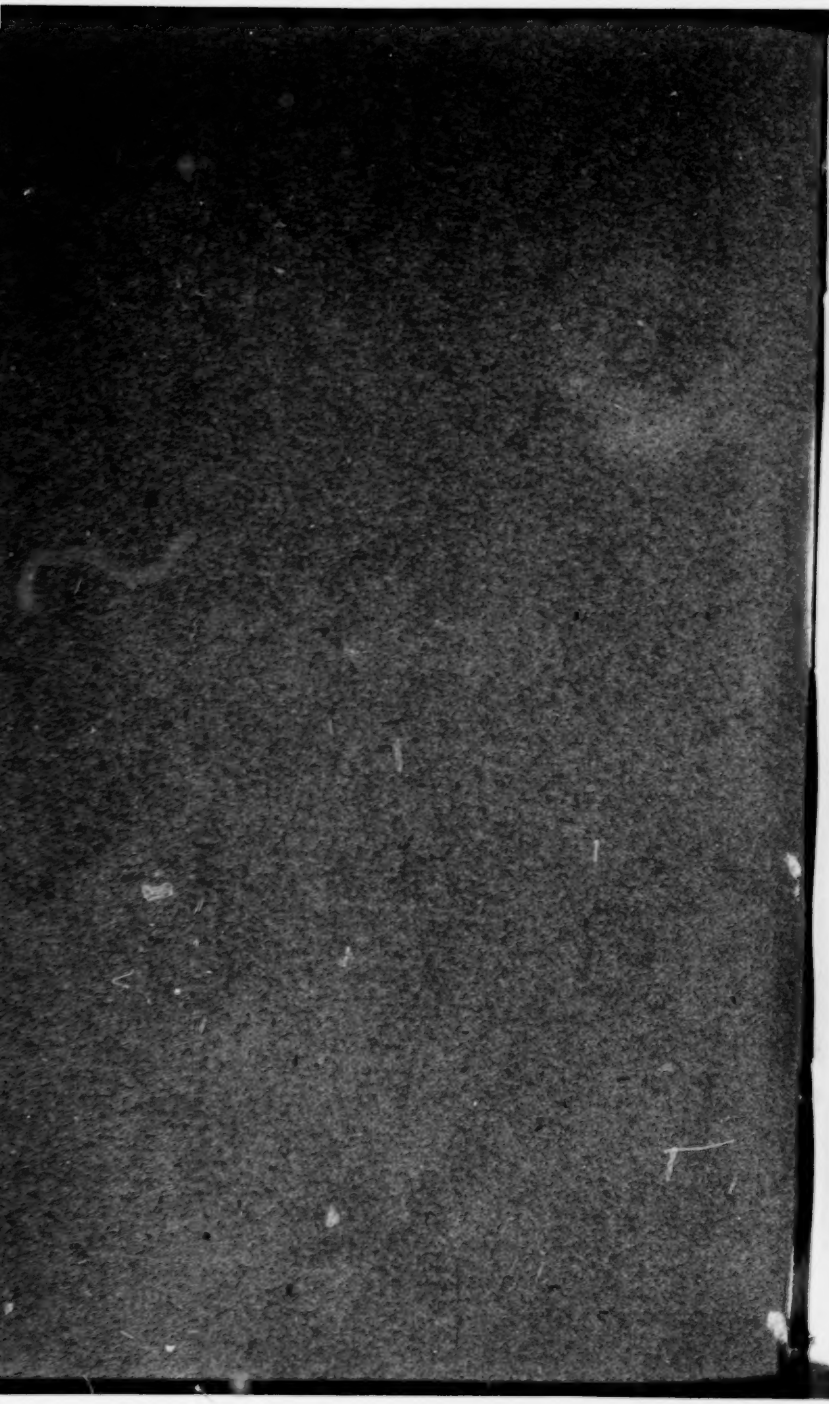
vs.

THE CITY OF ST. LOUIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JUNE 6, 1903.

(16,975.)



(18,573.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 62.

BERNARD SCHEFE, PLAINTIFF IN ERROR,

vs.

THE CITY OF ST. LOUIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 The United States of America to City of St. Louis, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the supreme court of Missouri, wherein Bernard Schefe is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Gavin D. Burgess, chief justice of the supreme court of Missouri, this 4th day of April, in the year of our Lord one thousand nine hundred and two.

G. D. BURGESS,
Chief Justice.

1½ UNITED STATES OF AMERICA, } ss:
Central Division of the Western District of Missouri, }

I hereby acknowledge due service of the within citation this 15th day of April A. D. 1902.

CHAS. W. BATES,
Attorney for Defendant in Error.

[Endorsed:] Supreme court of Missouri. City of St. Louis def't in error *vs.* Bernard Schefe, pl'ff in error. Citation. Filed Apr. 23 1902 Jno. R. Green clerk.

2 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1901, thereof between City of St. Louis, respondent and Bernard Schefe, appellant, a manifest error hath happened, to the great damage of the said Bernard Schefe, appellant as aforesaid, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause, in

the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of April, in the year of our Lord one thousand nine hundred and two.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States, for the western district of Missouri central division dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States,
Western District of Missouri, Central Division.

Allowed by

G. D. BURGESS,
Chief Justice.

2½ [Endorsed:] No. — United States circuit court, western district of Missouri, central division. City of St. Louis d'f't in error *vs.* Bernard Schefe pl'ff in error Writ of error to the supreme court of the State of Missouri. Filed Apr. 23 1902 Jno. R. Green clerk.

Return to Writ.

UNITED STATES OF AMERICA, } *ss:*
Supreme Court of Missouri, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I herewith subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 30th day of April, A. D. 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

3 STATE OF MISSOURI, *sct:*

Be it remembered, that heretofore, to-wit, on the 27th day of November, 1899, there was filed in the office of the clerk of the supreme court of the State of Missouri, a transcript in a certain cause, wherein The City of St. Louis was respondent and Bernard Schefe was appellant, which said transcript is in words and figures as follows, to-wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the St. Louis Court of Criminal Correction.

Be it remembered that on the 26th day of May, in the year of our Lord eighteen hundred and ninety-eight, there was filed in the office of the clerk of the St. Louis court of criminal correction, by the clerk of the first police district court of the city of St. Louis, a transcript and the papers in the case of The City of St. Louis *versus* Bernard Schefe; which transcript and papers are in the words and figures following, to-wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

CITY OF ST. LOUIS, *May 6th, A. D.* 1898.

Bernard Schefe to the City of St. Louis, Dr.

To five hundred dollars for the violation of an ordinance of said city, entitled "An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city," being ordinance number 18407, section 5, approved April 6th, 1896.

In this, to-wit: In the city of St. Louis and the State of Missouri, on the 5th day of May, 1898, and on divers other days and times prior thereto, the said Bernard Schefe being the owner and occupant of premises known as No. 3012 Osage St., city of St. Louis State of Missouri, did then and there at said time, and place and on said premises erect, build and establish a certain dairy and a certain cowstable, without first having obtained permission
4 so to do from the municipal assembly by proper ordinance.

2nd. And the said Bernard Schefe defendant herein did then and there at the time and place aforesaid, and on the premises aforesaid maintain a certain dairy and a certain cow stable without permission so to do having been obtained from the municipal assembly by proper ordinance, said dairy and cow stable not being in operation at the time of the approval of ordinance No. 18407 on April 6th, 1896.

Contrary to the ordinance in such case made and provided.

On information of Charles W. Francis.

H. A. CLOVER, JR.,
City Attorney of the City of St. Louis.

The State of Missouri to the city marshal of the city of St. Louis, Greeting:

Whereas, the city attorney of the city of St. Louis hath this day filed in the first district police court of said city, his written state-

ment, charging that Bernard Schefe has been guilty of violating an ordinance of the city of St. Louis entitled "An ordinance in revision of the ordinances of the city of St. Louis and to establish new ordinance provisions for the government of said city," being ordinance number 18407, section 5, clause — approved April 6 1896, by establishing and maintaining on premises 3012 Osage St., city of St. Louis, Mo., a certain dairy and cow-stable without permission so to do from the municipal assembly by proper ordinance, said dairy and cow-stable not being in operation at the time of the approval of ordinance 18407. These are, therefore, to command you to summon the said Bernard Schefe to appear before the police justice of the city of St. Louis, at the first district police court of said city on the 13th day of May 1898 to answer to the city of St. Louis, in an action of debt in the sum of five hundred dollars for the violation of the above entitled ordinance, and have you then and there this writ.

Given under my hand this 6th day of May, 1898.

THOS. H. PEABODY,
Police Justice of the First District
Court of the City of St. Louis.

5

STATE OF MISSOURI, } ss:
City of St. Louis, }

The State of Missouri to Leo Frank, Dr. Ellis, Kate Meyerscough, Edward Rose, H. D. M. Sommer, Barbara Muelharaith, Greeting:

You are hereby commanded, that, laying aside all excuses and delays, you personally be and appear before the police justice of the city of St. Louis, at the first district police court of said city, on the 13th day of May, A. D. 1898, at 9 o'clock a. m., to testify on the trial of a cause there pending, wherein The City of St. Louis is plaintiff, and Bernard Schefe is defendant, on the part of the plaintiff, and of this fail not at your peril.

Given under my hand, this 6th day of May, 1898, by order of the said police justice.

JOHN F. McENNIS,
Clerk of the First District Police Court
of the City of St. Louis.

Executed the within writ, in the city of St. Louis, on the 10 day of May, 1898, by reading a true copy of same to the within named defendant.

HENRY REINSTAEDLER,
City Marshal,
By GEO. VOLLMER,
Deputy City Marshal.

In the First District Police Court.

CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Now comes the defendant and moves the court to quash the summons and statement herein for the following reasons, to wit:

1st. Because said statement on information does not set forth facts sufficient to constitute a violation for any ordinance of the city of St. Louis.

2nd. Because ordinance No. 18407 is void and being un-
6 reasonable and oppressive to the citizen and the property owner and especially section 5 thereof.

3rd. Because section 5 of said ordinance is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law and without just compensation.

4th. Because the municipal assembly has no power or authority to enact section 5 of said ordinance.

5th. Because said section 5 is in contravention of common right and abridges the rights, privileges and immunities of the citizen and is unconstitutional and void.

6th. Because said section 5 is void as being a delegation of the power of the municipal assembly to some one else.

E. F. STONE,
Attorney for Defendant.

This motion overruled.
THOS. H. PEABODY.

Appeal Bond.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Application for appeal.

Affidavit.

Be it remembered, that on 13 day of May A. D. 1898, personally appeared before the police justice of the first district police court of the city of St. Louis, Bernard Schefe and made oath, that this application for an appeal is not made for the purpose of vexation or delay, but because he verily believes he is aggrieves by the judgment of the police justice of the first district police court.

BERNARD SCHEFE.

Sworn to and subscribed before me this day and year first above written.

THOS. H. PEABODY,
7 *Police Justice of the First District Police Court of the City of St. Louis.*

Security Bond.

CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Before the police justice of the first district police court of the city of St. Louis.

We, Bernard Schefe, as principal, and Gustav Niederer as security, acknowledge ourselves to owe, and stand indebted to the City of St. Louis in the sum of two dollars, upon this condition:

Whereas, Bernard Schefe has appealed from the verdict and judgment rendered against him for a fine and imprisonment before the police justice of the first district police court of the city of St. Louis, in a persecution wherein The City of St. Louis was plaintiff, and Bernard Schefe defendant, to the St. Louis court of criminal correction. Now, if the said defendant shall appear before the St. Louis court of criminal correction, and prosecute his appeal with due diligence, to a decision, and if the judgment of the said police justice be affirmed, or, upon a trial anew in said court, judgment be given against him, shall pay or abide by the same, and obey every order which shall be made in the premises, and not depart the court without leave; or, if his appeal be dismissed, he shall pay the judgment of the police justice, together with all costs and render himself in execution, and abide by and perform the judgment of said police justice as therein adjudged against him, this recognizance shall be void, otherwtse it shall remain in force.

Given under our hands, this 15th day of May, A. D. 1898.

Principal, BERNARD SCHEFE.
Security, GUSTAV NIEDERER.

Taken and approved, and I certify that the above recognizance was executed and acknowledged before me this — day of —— A. D. 189–.

THOS. H. PEABODY,
8 *Police Justice, First District Police Court, City of St. Louis.*

Residence of security, 3012 Osage street. Property lies —.

(*Police Court Transcript.*)

In the First Police District Court of the City of St. Louis.

THE CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Charge,

Violating city ordinance number 18407, section 5, approved April 6, 1896.

Debt, five hundred dollars for the violation of an ordinance of said city, entitled "An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city," being ordinance number 18407, section 5, approved April 6th, 1896.

On the 6th day of May, 1898, the city attorney of the city of St. Louis files his written statement charging the above named defendant with violating the above entitled ordinance, whereupon, a summons is issued dated May 6th, 1898, and directed to the marshall of the city of St. Louis returnable forthwith. Returned, duly executed on the 10 day of May, 1898, and the case set for May 13, 1898.

On the 13th day of May, 1898, the case is called, and defendant by his attorney files a motion to quash.

The motion is overruled by the court and now comes the attorney for the City of St. Louis, and the defendant in his own proper person also comes, and having seen and heard read the information herein, says he is not guilty in manner and form as therein charged. And the court having heard the evidence and being fully advised of and concerning the premises, doth find the defendant guilty as charged, and assess his punishment at a fine of one hundred dollars.

9 It is, therefore, considered and adjudged by the court that the said defendant for his said offense pay to the City of St. Louis a fine of one hundred dollars, together with the costs herein accrued.

Thereupon comes defendant and files his affidavit and bond, with Gustav Niederer as security, for appeal, whereupon an appeal is taken to the St. Louis court of criminal correction.

And afterwards to-wit, on the 4th day of June the following proceedings were had, to-wit:

In the St. Louis Court of Criminal Correction.

SATURDAY, *June* 4, *A. D.* 1898.

THE CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Bow at this day comes the defendant by his attorney and files a motion to quash the writ herein.

And afterwards to-wit on the 6th day of June, A. D. 1898, the following further proceedings were had to-wit:

In the St. Louis Court of Criminal Correction.

MONDAY, *June 6th, A. D.* 1898.

THE CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Now at this day the court having heard the arguments of counsel touching the motion to quash the writ herein and being fully advised of and concerning the same doth order and determine that the same be overruled.

And afterwards to-wit, on the 26th day of November, A. D. 1898, the following further proceedings were had to-wit:

In the St. Louis Court of Criminal Correction.

SATURDAY, *November 26th, A. D.* 1898.

THE CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Now at this day comes the attorney for the city, and the defendant in his own proper person also comes, and having seen and heard the writ herein, says he is not guilty in manner and form as therein charged, and the court, having heard the evidence and being fully advised of and concerning the same doth find the defendant guilty of the said charge. It is therefore considered and adjudged by the court, that the said defendant, for his said offense, pay to the City of St. Louis, for use of the City of St. Louis a fine of one hundred dollars, together with the costs herein accrued, and that execution issue therefor.

And afterwards, to-wit, on the 28th day of November, A. D. 1898, the following further proceedings were had, to-wit:

In the St. Louis Court of Criminal Correction.

MONDAY, *November 28th, A. D.* 1898.

THE CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Now at this day comes the defendant by his attorney and files a motion for a new trial herein and the court having heard the arguments of counsel touching said motion, doth order and determine that the said motion be overruled.

And afterwards, to-wit, on the 1st day of December, A. D. 1898, the following further proceedings were had to-wit:

In the St. Louis Court of Criminal Correction.

THURSDAY, *December 1st, A. D.* 1898.

THE CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Now at this day comes the defendant by his attorney and files a motion in arrest of judgment herein, and the court having heard the arguments of counsel touching said motion and being fully advised of and concerning the same doth order and determine that the said motion be overruled. Thereupon comes the attorney for the city and the defendant in his own proper person also comes.

Thereupon the defendant files his bill of exceptions herein duly signed and sealed by the court and prays an appeal from the judgment of this court to the supreme court of the State of Mis-
11 souri, and the court being of the opinion that there is probable cause for such appeal doth grant the same, and the defendant having filed his affidavit and appeal bond with good and sufficient security approved by the court, it is ordered by the court that this appeal shall operate as a supersedeas until this cause be heard and determined by the said supreme court of the State of Missouri.

Which bill of exceptions is in words and figures as follows: to wit:

In the St. Louis Court of Criminal Correction.

THE CITY OF ST. LOUIS, Plaintiff,
vs.
BERNARD SCHEFE, Defendant.

Be it remembered that on the trial and hearing of this cause the following proceedings were had: Defendant moves the court to quash the statement and summons, as follows, to-wit:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

Now comes the defendant and moves the court to quash the writ and statement in the above entitled cause, for the following reasons, to-wit:

1st. Because the statement does not set forth facts sufficient to constitute any offense under the charter and ordinances of the city of St. Louis.

2nd. Because section five of said ordinance No. 18407 is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law.

3rd. Because said section five is void as being unequal, unreasonable, oppressive, partial and discriminating in its application to the citizen and property owner.

4th. Because said section 5 is void, there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same.

12 5th. Because said section 5 is retrospective in its nature and application, therefore in violation of the rights of private property.

6th. Because said section is void being a delegation of the powers of the municipal assembly.

7th. Because said section 5 is in violation of section 30 art. II of the constitution of the State of Missouri.

8th. Because said section 5 is in violation of section 4 of art. II of the constitution of the State of Missouri.

9th. Because said section 5 is void as being in violation of the XIV amendment to the Constitution of the United States in that, "No State shall make or enforce any law which shall abridge the privilege- or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

10th. Because said section 5 is void, as having a district tendency to create and perpetuate a monopoly.

E. F. STONE,
Attorney for Defendant.

Said motion was overruled by the court to which ruling of the court the defendant then and there duly excepted.

The defendant pleaded not guilty to the charge made in the statement; the cause was submitted to the court upon an agreed statement of facts as follows, to-wit:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS
vs.
BERNARD SCHEPE.

Agreed Statement of Facts.

It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statements of facts, to-wit:

13 The plaintiff, The City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and the defendant is the owner and occupant of certain premises known as No. 3012 Osage street, in the city of St. Louis, State of Missouri, upon which was located on the 5th day of May, 1898, a dwelling house and frame stable, which said stable had been erected and built prior to the ownership and occupancy of said premises by said defendant.

Defendant who was at the time a dairyman of several years' standing in the said city, did on or about the 5th day of May, 1898, place in said stable a number of cows and did proceed to conduct upon said premises a dairy establishment, and produce and sell milk therefrom, and was doing so at the time of the commencement of this action in the first district police court; that defendant commenced the operation of said dairy establishment on or about the aforesaid date without having obtained permission to do so from the municipal assembly by ordinance, and defendant did maintain on said premises a dairy and cow stable without permission to do so having been obtained from the municipal assembly.

Said dairy and cow stable was not in operation upon said premises at the time of the approval of ordinance No. 18407 on April 6th, 1896. The said section 5 of said ordinance No. 18407 being as follows, to-wit:

"SEC. No. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper

ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five-hundred dollars."

That no question of nuisance or no nuisance shall be con-
14 sidered in this case.

It being hereby distinctly understood, agreed and stipulated that the issue and question submitted to the court for decision and determination is the validity or invalidity of the said section 5, of ordinance No. 18407; and upon which judgment shall be had either by plaintiff or defendant as the court may find. Section 5 of ordinance No. 18407 as set out herein may be considered in evidence for the purposes of this case.

THE CITY OF ST. LOUIS,
By CHAS. H. BROCK, *Attorney.*
BERNARD SCHEFE,
By E. F. STONE, *Attorney.*

Under this stipulation the court found and adjudged the defendant guilty as charged, and assessed his fine at one hundred dollars and costs.

And on the 28th day of November, 1898, and within four days after the rendering of said judgment, the defendant filed his motion for a new trial as follows, to-wit:

CITY OF ST. LOUIS, }
State of Missouri, } *ss:*

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS }
vs.
BERNARD SCHEFE. }

Now comes defendant and moves the court to set aside the finding and judgment in this cause and grant a new trial therein for the following reasons, to-wit:

1st. The finding of the court is against the evidence presented at the trial.

2nd. The judgment is against the weight of the evidence.

3rd. The judgment is against the law.

4th. The judgment is against the law and the evidence.

5th. Because the court erred in overruling motion of defendant to quash the writ and statement filed in said cause.

15 6th. Because the statement does not state facts sufficient to constitute a cause of action, nor any offense under the ordinances of the city of St. Louis.

7th. Because section 5 of said ordinance No. 18407 is unconstitutional and void for the reason that it operated to deprive a person of property without due process of law.

8th. Because said section 5 is void as being unreasonable and oppressive to the citizen and property owner.

9th. Because said section 5 is void there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same.

10th. Because said section 5 is retrospective in its nature and application, therefore in violation of the rights of private property.

11th. Because said section 5 is void, being a delegation of the powers of the municipal assembly.

12th. Because said section 5 is in violation of section 30 art. 11 of the constitution of the State of Missouri.

13th. Because said section 5 is in violation of section 4 of art. II of the constitution of the State of Missouri.

14th. Because said section 5 is void as being in violation of the XIV amendment of the Constitution of the United States in that "No State shall make or enforce any law which shall abridge the privilege- or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

E. F. STONE,
Attorney for Defendant.

Which said motion the court, on the 28th day of November, 1898, overruled, to which ruling and order of the court the defendant then and there duly excepted.

And on the 1st day of December, 1898, and within ten days after the said motion for a new trial was overruled, defendant filed
16 his motion in arrest of judgment as follows:

CITY OF ST. LOUIS, }
State of Missouri. }

In the St. Louis Court of Criminal Correction.

THE CITY OF ST. LOUIS }
vs. }
BERNARD SCHEFE. }

Now comes the defendant and moves the court to arrest the judgment in this cause for the reasons, following, to wit:

1st. That upon the record said judgment is erroneous.

2nd. That the statement and summons does not state facts sufficient to constitute a cause of action against the defendant.

3rd. The finding and judgment of the court are not responsive to the issues made by the pleadings.

E. F. STONE,
Attorney for Defendant.

Which said motion in arrest of judgment the court on the 1st day of December, 1898, overruled, to which ruling and order of the court the defendant then and there duly excepted. And that the above matters and things, rulings and exceptions may be made a part of the record, defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed as such, which is accordingly done this 1st day of December, 1898.

DAVID MURPHY, [SEAL.]
Judge of the St. Louis Court of Criminal Correction.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Phillip H. Zepp, clerk of the St. Louis court of criminal correction, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in said court, in the cause of The City of St. Louis *versus* Bernard Schefe, as fully as the same remains of record and on file in my office.

17 In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office, in the city of St. Louis, this 1 day of February in the year of our Lord eighteen hundred and ninety-nine.

[L. S.] ALFRED J. WAGGEMANN, *Clerk.*

And afterwards, to wit, on the 9th day of February, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Resp.,
v.
BERNARD SCHEFE, App.

Comes now the said respondent by attorney, and files its motion to transfer this cause to the court in banc.

Which said motion is in words and figures as follows, to wit:

In the Supreme Court, State of Missouri.

CITY OF ST. LOUIS
vs.
BERNARD SCHEFE.

And now comes City of St. Louis, plaintiff in the above entitled cause, and suggests to the court that the issues in this case are

practically identical with those in the case of City of St. Louis *vs.* John G. Fischer, now pending in this court, which latter case was by order of the court, division No. 2, transferred to court in banc for hearing, and moves, the court to transfer the case of City *vs.* Schefe to court in banc and order a hearing of the same with the case of City *vs.* Fischer.

CHAS. W. BATES,
Att'y for City of St. Louis.

And afterwards, to wit, on the 24th day of January, 1902, the further following proceedings were had in said cause, viz:

* * * * * * *

18 CITY OF ST. LOUIS, Resp.,
v.
BERNARD SCHEFE, App.

Come now the said parties by attorneys, and after arguments herein, submit these causes to the court.

And afterwards, to-wit, on the 19th day of February, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
vs.
BERNARD SCHEFE, Appellant.

Appeal from St. Louis court of criminal correction.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis court of criminal correction rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, in Banc, January Call, 1902.

CITY OF ST. LOUIS, Respondent,
vs.
BERNARD SCHEFE, Appellant.

This is an action by the City of St. Louis to recover a fine of five hundred dollars for a violation of section 5 of an ordinance of said city No. 18,407, providing that no person within the limits of said city shall hereafter erect, build or maintain a dairy or cow stable,

without having first received permission so to do by proper ordinance.

The cause was tried on an agreed statement of facts and defendant was fined $100.00 by the court of criminal correction.

As he challenged the constitutionality of the ordinance, the appeal was sent to this court.

All questions raised in argument and brief have been
19 passed on in the case of The City of St. Louis *v.* Fischer, which was heard at the same time. For the reasons assigned in the opinion this day rendered in that case, the judgment of the court of criminal correction is affirmed.

Burgess, C. J., Robinson, Brace, Marshall and Valliant JJ. concur; Sherwood J. dissents.

JAS. B. GANTT.

And which said opinion in the case of City of St. Louis against Fischer, is in words and figures as follows, viz:

In the Supreme Court of Missouri, Division No. 2, October Term, 1901.

THE CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.

This is a civil action by the City of St. Louis to recover a fine of $100.00 for the violation of section 5 of a city ordinance of said city numbered 18407, approved April 6th, 1896, which said section is in these words:

"No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. And persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars."

The complaint charged that defendant in the city of St. Louis and State of Missouri *did* on the 16th day of November, 1898, and on divers other days and times prior thereto was the occupant of certain premises known as 7208 and 7210 North Broadway in said city, and did then and there erect, build, and establish on said premises a dairy and cow stable without forst having obtained permission so to do from the municipal assembly by proper ordinance, and furthermore did at said times and place maintain said dairy and cow stable without having obtained permission from said
20 municipal assembly of said city by proper ordinance and that said dairy and cow stable was not in operation at the

time of the approval of said ordinance No. 18407, to-wit, April 6th, 1898, contrary to the said ordinance.

The defendant was found guilty in the police court and appealed to the court of criminal correction. In the last mentioned court he moved to quash the complaint on nine grounds, as follows:

1st. Because the statement does not set forth facts sufficient to constitute any offense under the ordinances of the city of St. Louis.

2nd. Because section 5 of said ordinance No. 18407, is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law.

3rd. Because said section 5 is void as being unreasonable and oppressive to the citizen and the property owner.

4th. Because said section is void, there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same.

5th. Because said section is retrospective in its nature and application and therefore in violation of the rights of private property.

6th. Because said section 5 is void, being a delegation of the powers of the municipal assembly.

7th. Because said section is in violation of section 30 art. II of the constitution of the State of Missouri.

8th. Because said section 5 is in violation of section 4 of article II of the constitution of Missouri.

9th. Because said section 5 is void as being in violation of the XIV amendment to the Constitution of the United States in that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The court of criminal correction overruled this motion
21 and thereupon entered his plea of not guilty and the cause was submitted to that court upon an agreed statement of facts, without a jury, and the court found defendant guilty of a violation of said ordinance and fined him $100.00, from which he appeals to this court.

The agreed statement of facts is in these words:

"It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to wit:

The plaintiff, The City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of ordinance No. 18407 of said city

and State, said premises, buildings, and stable were occupied and in use by a certain other party than this defendant for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city, and State. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to premises Nos. 7208 and 7210 North Broadway said city, placed them in the old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was so doing on the said sixteenth day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance, as provided by section 5 of ordinance No. 18407, of the city of St. Louis, approved April 6, 1896.

22

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked Exhibit A, which is attached and made a part of this agreed statement of facts, is a full, true and correct copy of said ordinance No. 18,407, and may be considered in evidence in this cause.

Section 5 of ordinance No. 18,407, with a violation of which defendant was charged, is as follows:

"SEC. 5. No dairy or cow stable shall hereafter be erected, built or established, within the limits of this city, without first having obtained permission so to do from the municipal assembly, by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises, unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars."

The transcript in this case is somewhat difficult to understand. It is either all record proper, or all bill of exceptions. There is nothing in the nature of the record proper showing a trial, the entry of judgment, the filing of any of the motions, or the action taken by the court thereon. There is nothing in the transcript showing any copy of the affidavit for appeal, the bond for appeal or the order granting an appeal to this court. There is nothing showing the filing of a bill of exceptions. At the same time these matters are set forth as if in a bill of exceptions, signed by the judge of the trial court.

I.

The city of St. Louis is a municipal corporation, existing under a charter framed and adopted *and adopted* by the qualified voters therein on the 22nd day of August, 1876, which took effect October 22nd, 1876 (State *ex rel. v.* Sutton, 3 M. A. 388) pur*d*uant to the provisions of sections 20, 21, 22, 23, 24 and 25 of article 9 of the
23 constitution of Missouri, 1875, and has all the force and effect of a charter which emanates from the General Assembly, Kansas City *vs.* Oil Co. 140 Mo. 458. By the 6th paragraph of section 26 of article 3 of the said charter the mayor and the municipal assembly of St. Louis are given power within the city, by ordinance not inconsistent with the constitution or any law of this State or the charter itself, "to *prohibit* the erection of soap factories, stock yards, and slaughter houses, pig pens, *cow stables and dairies*, coal oil and vitriol factories, within prescribed limits, and to remove and regulate the same; and to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health."

On April 6th, 1896, the mayor and municipal assembly passed the ordinance set out in the accompanying statement making it a misdemeanor for any person thereafter to erect, build or establish or maintain within the limits of said city any dairy or cow stable without having first obtained permission so to do from the municipal assembly by a proper ordinance and prescribing a penalty for a violation thereof.

At the outset it will be observed that *express power* is conferred upon the mayor and municipal assembly to *prohibit*, and to remove and regulate cow stables and dairies *within prescribed limits.*

To the mayor and assembly is confided the power of fixing and *prescribing* the limits within which no dairy or cow stable shall be built or maintained in the city of St. Louis. As the grant in the charter is express, we are relieved from any discussion to demonstrate that the dairy business is of a character that brings it within the police power of the State and properly subjects it to rigid rules of regulation, and even absolute prohibition in large and populous cities. Indeed, few occupations are so peculiarly liable to cause injury by the sale of impure milk to people who purchase milk as a necessary article of food or which are more generally regarded as nuisances, even under favorable circumstances.

That the people of this State could delegate this power to
24 the municipality is no longer open to dispute. It clearly falls within the proper function of municipal government.

As the people of the State have conferred the power upon the city without restriction, it was entirely within the discretion of the mayor and assembly to prescribe the limits and it was competent to fix the boundaries of the city as prescribed limits and this was done by the ordinance 18407.

Counsel for defendant insists that the municipal assembly must have first designated certain districts within the city by metes and

bounds, within which no dairy or cow house should be erected or maintained, but the charter does not so command. It nowhere limits the prohibited territory to less than the whole city. Counsel, for defendant cites *In re* Linehan, 72 Cal. 114 as sustaining his position. But reference to that case will show that the charter power was "to exclude *from certain limits*" the obnoxious occupations and the city council had merely defined a district bounded by certain streets in which it should be unlawful for any person to keep more than two cows and the supreme court upheld the ordinance. No question of the power of the city of San Francisco to make such an ordinance applicable to the whole of said city arose in that case and nothing in the decision supports the proposition now advanced that the city of St. Louis must necessarily prescribe a district therein less than its municipal boundaries, and we have no doubt of the power under the charter to make the prescribed limits co-extensive with the city limits, and this we construe this ordinance to have done.

But learned counsel for defendant argues that because the city has not made the prohibition absolute and prevented all persons from erecting or maintaining dairies and cow stables anywhere in the city but has deemed it proper to say that no person should erect or maintain a dairy or cow stable without permission first obtained by a proper ordinance, this ordinance is void; that it provides for special privileges to one man by special ordinance which it might deny to another man, his next door neighbor. We think his position is entirely untenable. The charter confers not only the power *to prohibit*, but to remove and *regulate* and it was entirely competent for the assembly to decline to prohibit dairies altogether, but to impose upon all persons desiring to erect or maintain a dairy or cow stable to first obtain permission from the mayor and assembly by a duly enacted ordinance. Having absolute power to prohibit, it could make its own conditions. Railroad *v.* Kirkwood, 159 Mo. 239. As was said in St. Louis *v.* Howard, 119 Mo. *loc. cit.* 46. "Regulation" means a rule or order for management or government." So that paragraph 6 of section 26 of article 3 of the charter empowers the city (by *ordinance of course*, for that is the only way the city can legislate) to prescribe rules whereby slaughter houses may be erected or operated, or whereby such erection or operation may be checked or restrained, *either partially* or *in toto*, but in that case the defendant was acquitted because although the city had plenary powers in this regard, it had not seen fit to exercise them by an ordinance making it a misdemeanor to carry on or operate a slaughter house "*without first* having *obtained* permission so to do from the municipal assembly by proper ordinance."

In this case, the city has passed just such an ordinance and made it coextensive with the boundaries of the city, and just such an ordinance met the approval of this court in St. Louis *v.* Howard, 119 Mo. 47, the only difference being that in the last mentioned case it was forbidden to erect a slaughter house within three hundred feet of any dwelling house, whereas in this ordinance dairies

are prohibited throughout the city unless the assembly shall first permit them by proper ordinances.

We are asked to declare this ordinance void in the face of the unrestricted power in the charter because forsooth the assembly may at some time discriminate against one man and favor another. We cannot and shall not indulge any such presumption against the integrity of the municipal assembly, but shall, as was said in City *v.* Howard, 119 Mo. 50, assume that the municipal assembly before granting permission will inquire and determine whether the place and the neighborhood is a proper one in which to allow a
26 dairy to be maintained and will act impartially. "Such favorable presumptions are constantly indulged in regard to legislative action." State *ex rel. v.* Mead, 71 Mo. 272.

It is at once apparent that no iron-clad rule can fit every case. The assembly may well determine that the keeping of a dairy in the outskirts of a city where the population is sparse and the areas large would not be a nuisance whereas to permit a dairy in the thickly populated portion of the city, or near a school house, church or hospital, would seriously endanger the public health, and in the exercise of its plenary powers permit it in the one case, and prohibit it in the other, without being obnoxious to the criticism of partiality. Under the charter it is given legislative discretion in this matter. In our opinion the ordinance prescribed the limits and it was entirely proper and lawful to require every person desiring to erect or maintain a dairy to obtain permission by a proper ordinance and such an ordinance is the only defence to an action like this. City *v.* Howard 119 Mo. 47.

We can see no more objection to such an ordinance than could be urged against the granting of a franchise to run a street railroad on a particular street.

A railroad laid in a street without authority is a nuisance and yet it has never been held that an ordinance to be valid must permit everybody to maintain railways in all the streets.

It is a matter within the authority of the assembly.

II.

As to the objection that the ordinance violates the 14th amendment to the Constitution of the United States, it is sufficient to say that it does not contravene that amendment because it operates upon all persons alike, and that every man holds his property subject to the maxim that he must so use it as not to injure his neighbor.

Nothing in that amendment has shorn the States of their police power to prohibit or regulate unwholesome trade and occupations. Slaughter House cases, 16 Wall. 36; Tiedeman's State & Federal Control of Person & Property, p. 731; *In re* Linehan, 72 Cal.
27 114; State *v.* Broadbelt, 89 Md. 565; 2 Kent Com. 340; City of St. Louis *v.* Howard 119 Mo.; Eichenlaub *v.* St. Joseph, 113 Mo. 395.

Nothing in the Constitution of the United States or of this State

secures to any man the right to maintain a nuisance to the discomfort of the health of his neighbor.

It is not deemed necessary to answer seriatim all the objections to the constitutionality of this ordinance. We have considered them all and are satisfied they are not tenable or sound. There is nothing retrospective in the application of this ordinance to defendant. It was adopted in 1896. He began without the permission of a proper ordinance to carry on and maintain this dairy at the premises mentioned in the complaint in 1898, long after the ordinance was in force.

The ordinance is levelled at the maintenance of a dairy, the keeping of cows for the sale of milk, and the mere fact that the premises had once been so occupied prior to 1898, but subsequently abandoned for such a use, did not authorize defendant to start up a new dairy on said premises without the necessary condition precedent of a lawful ordinance. Accordingly we hold his conviction was proper and the judgment is affirmed. Burgess C. J. concurs in these views.

JAS. B. GANTT.

In the Supreme Court of Missouri, Court in Banc, October Term, 1902.

THE CITY OF ST. LOUIS, Respondent,
vs.
JOHN G. FISCHER, Appellant.

Per curiam:

Upon a rehearing by the court in banc the foregoing opinion of Gantt, J., in division No. 2, is adopted by the court in banc.

Burgess, C. J., Robinson, Brace, Marshall and Valliant, JJ., concurring therein. Sherwood J. dissenting and expressing his views in a dissenting opinion.

And afterwards, to-wit, on the 1st day of March, 1902, the
28 further following proceedings were had in said cause, viz:

* * * * * * *

ST. LOUIS, Resp.,
v.
BERNARD SCHEFE, App.

Come now the said appellants, by attorneys, and file their motions for rehearings herein.

Which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court, State of Missouri, in Banc, January Call, 1902.

CITY OF ST. LOUIS, Respondent,
vs.
BERNARD SCHEFE, Appellant.

Now comes the appellant in this cause by his attorney, and moves the court to grant him a rehearing in this cause, and in support of his motion sets out the following grounds:

I.

Irrespective of the extent of the power of the City of St. Louis to regulate and restrict the erection and maintenance of dairies and cow-stables, we urged in our brief that the ordinance prescribing restrictions and regulations must be so drawn as to prescribe the conditions exactly which are to determine who may, and under what conditions one may, engage in the dairy business. The municipal assembly cannot leave the question of determining each case, in which an ordinance may be applied for, to the unrestrained will or caprice of any officer or body of men.

We again refer the court to the cases of "unlawful delegation of power" cited in our brief, which cases are not referred to in the opinion of the court.

II.

On the Federal question raised in the case we urge that the cases of *In re* Tie Lay and Yick Wo *vs.* Hopkins, cited in our brief, are directly in point and sustain our position. We respectfully urge a reconsideration of this question for the reason that the court
29 in its opinion does not discuss the bearing of those cases on the case at bar, nor refer to them at all.

The facts set out in those cases are so similar to the facts in this case that we believe the decisions rendered by the U. S. courts in them are controlling in the case at bar.

Respectfully submitted.

G. N. FICKEISSEN,
Attorney for Appellant.

And afterwards, to-wit, on the 19th day of March, 1902, the further following proceedings were had in said cause, viz:

* * * * * * *

CITY OF ST. LOUIS, Resp.,
v.
BERNARD SCHEFE, App.

Now at this day the court having fully considered and understood the motion- heretofore filed for rehearings herein, doth order that said motion- be and the same are hereby overruled.

And afterwards to-wit, on the 23rd day of April, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
vs.
BERNARD SCHEFE, Appellant.

Now at this day, there is presented to the Honorable Gavon D. Burgess, chief justice of the supreme court of the State of Missouri in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing it to appear at a Supreme Court of the United States on the 4th day of May; an assignment of errors and a bond in the sum of five hundred dollars, which said writ of error is allowed, said citation signed, said assignment of errors filed, and said bond approved, ordered filed and made a part of the record herein.

Which said assignment of errors is in words and figures as follows, viz:

In the Supreme Court of the United States, —— Term, 1902.

30 BERNARD SCHEFE, Plaintiff in Error,
vs.
CITY OF ST. LOUIS, a Municipal Corporation, Defendant in Error.

Comes now Bernard Schefe, plaintiff in error, by his counsel and respectfully represents, that he feels himself to be aggrieved by the proceedings and judgment of the supreme court of the State of Missouri in the above entitled cause, and assigns error thereto as follows:

First. The court erred in deciding that a dairy and cow-stable are a nuisance *per se*.

Second. The court erred in deciding that the ordinance in question is a reasonable police regulation.

Third. The court erred in deciding that The City of St. Louis, defendant in error, has the authority to prohibit the operation of a dairy and cow-stable in every part of the corporate limits.

Fourth. The court erred in deciding, that The City of St. Louis, defendant in error, has the authority to remove existing dairies and cow-stables out of the corporate limits.

Fifth. The court erred in deciding that the ordinance in question does not tend to the destruction of a lawful business.

Sixth. The court erred in deciding that the ordinance in question does not violate section I of the IV amendment of the Constitution

the United States, in discriminating between persons of the same ss.

Seventh. The court erred in deciding that the ordinance in ques- n does not deprive persons of their property without due process law.

Eighth. The court erred in deciding that the ordinance in ques- n does not deny to persons within the same jurisdiction the equal otection of the law.

Ninth. The court erred in sustaining the judgment of the trial urt *court* in this cause.

Tenth. The court erred in rendering judgment in favor of the defendant in error and against the *defendant* in error in this cause.

Wherefore the said plaintiff in error prays the honorable urt to examine and correct the errors assigned and for a reversal the judgment of the supreme court of the State of Missouri en- ed in this cause.

Respectfully submitted,

CHAS. P. JOHNSON,
G. N. FICKEISSEN,
Counsel for Plaintiff in Error.

And which said bond is in words and figures as follows, viz:

Know all men by these presents, that we, Bernard Schefe, as prin- al, and Bernard Scheer and Hermann Immken as sureties, are held d firmly bound unto the City of St. Louis in the full and just sum five hundred dollars, to be paid to the said City of St. Louis, to ich payment well and truly to be made we bind ourselves, our rs, executors, and administrators, jointly and severally by these sents.

Sealed with our seals and dated this 19th day of April, in the year our Lord, one thousand nine hundred and two.

Whereas, lately at the October term, A. D. 1901, of the supreme urt of Missouri, in a suit depending in said court between City of Louis, respondent and Bernard Schefe, appellant, judgment was dered against the said appellant, and the said Bernard Schefe, pellant, as aforesaid, having obtained a writ of error to the said urt to reverse the judgment in the aforesaid suit, and a citation di- ted to the said City of St. Louis, citing and admonishing it to be and pear at a Supreme Court of the United States to be held at Wash- ton, D. C. not exceeding thirty days from and after the date of citation in said cause,

Now, the condition of the above obligation is such, that if the said rnard Schefe shall prosecute said writ to effect and answer all

damages and costs, if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

BERNARD SCHEFE. [SEAL.]
BERNARD SCHEER. [SEAL.]
HERMANN IMMKEN. [SEAL.]

32 Sealed and delivered in presence of—
G. N. FICKEISSEN.
JAS. R. GRAY.
JAS. R. GRAY.

Approved by—
G. D. BURGESS, *Judge.*

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *sct:*

Before me, James R. Gray, United States commissioner at St. Louis, Missouri, personally appeared Bernard Scheer to me well known who upon oath states that he is worth over and above his indebtedness the sum of four thousand dollars, and that he owns real property to that amount, subject to execution in the city of St. Louis, Missouri.

[SEAL.] BERNARD SCHEER.

Subscribed and sworn to before me this 19th day of April, 1902.
JAMES R. GRAY,
United States Commissioner at St. Louis, Missouri.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *sct:*

Before me, James R. Gray, United States commissioner at St. Louis, Missouri, personally appeared Hermann Immken, to me well known who upon oath states that he is worth over and above his indebtedness the sum of five hundred dollars, and that he owns real property to that amount subject to execution in the city of St. Louis, Missouri.

[SEAL.] HERMANN IMMKEN.

Subscribed and sworn to before me this 19th day of April, 1902.
JAMES R. GRAY,
United States Commissioner at St. Louis, Missouri.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *sct:*

I do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years, and are competent to contract, and that their signatures to said bond are genu-
33 ine: I further certify that said bond is good and sufficient.

Witness my hand and seal this 19th day of April, 1902.

[SEAL.] JAMES R. GRAY,
Clerk of the United States Circuit Court, Eastern District,
Eastern Judicial District of Missouri.

STATE OF MISSOURI, *sct:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the record and proceedings in a certain cause entitled The City of St. Louis *vs.* Bernard Schefe, as fully and complete as the same appear of record and on file in my said office.

In witness whereof, I have hereunto set my hand as clerk and affixed the seal of said court. Done at office, in the city of Jefferson, this 30th day of April, 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No. 18,573. Missouri supreme court. Term No. 62. Bernard Schefe, plaintiff in error, *vs.* The City of St. Louis. Filed June 5th, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

BERNARD SCHEFE,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS.
No. 62.

In Error to the Supreme Court of the State of Missouri.
(18,573)

STATEMENT.

This case arose in the police court of the city of St. Louis upon the following facts:

Plaintiff in error for some years prior to May, 1898, had been a resident of St. Louis, engaged in business as a dairyman, maintaining and operating a dairy in said city.

On May 5, 1898, and prior thereto, he was the owner of a piece of property known as number 3012 Osage street, in said city, and upon the property he

had a dwelling house and stable, but maintained his dairy elsewhere.

On May 5, 1898, he removed his cows and dairy from his former location, installed his cows in the stable upon the property described and began to conduct his business as a dairyman upon the premises.

At that time there was in force in the city of St. Louis a certain ordinance known as section 5 of ordinance No. 18,407, approved April 6, 1896, which provided:

> "No dairy or cow stable shall hereafter be erected, built or established within the limits of this city, without having first obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars."

Plaintiff in error had not obtained the permission to maintain and operate his dairy at the premises 3012 Osage street, as required by said ordinance, and on the 6th day of May, 1898, the city attorney of St. Louis instituted this cause in the police court by filing

against the plaintiff in error a complaint in the words and figures following:

> "May 6, 1898, B. Schefe to city of St. Louis Dr. $500, violation ordinance 18,407, section 5, approved April 6, 1896. On the 5th day of May, 1898, B. Schefe, being the owner and occupant of premises known as No. 3012 Osage street, St. Louis, Missouri, did then and there at said time and place and on said premises erect, build and establish a certain dairy and a certain cow stable without first having obtained permission so to do from the municipal assembly by proper ordinance.
>
> "Second.—And the said B. Schefe, defendant herein, did then and there at the time and place aforesaid, and on the premises aforesaid, maintain a certain dairy and cow stable without permission so to do from the municipal assembly by proper ordinance."

In all the lower courts the cause was tried upon an agreed statement of facts which follows:

> "The plaintiff, the city of St. Louis, is a municipal corporation organized and existing under the laws of the state of Missouri, and defendant is owner and occupant of 3012 Osage street, St. Louis, Missouri, upon which was located on the 5th day of May, 1898, a dwelling and frame stable, which said stable had been erected and built prior to the ownership and occupancy of premises by defendant.

"Defendant, who was at the time a dairyman of several years' standing in the said city, did on or about the 5th of May, 1898, place in said stable a number of cows, and did proceed to conduct upon said premises a dairy, and produce and sell milk therefrom and was doing so at the time of commencement of action in First District Police Court. That defendant commenced the operation of said dairy establishment on or about the aforesaid date without having obtained permission to do so from the municipal assembly by ordinance, and defendant did maintain on said premises a dairy and stable without permission.

"Said dairy and stable was not in operation upon said premises at the time of the approval of ordinance 18,407, on April 6, 1898, said section 5 of said ordinance 18,407 being as follows:

" 'Section 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without having first obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.'

"That no question of nuisance or no nuisance shall be considered in this case:

"It being hereby distinctly understood, agreed and stipulated that the issue and question submitted to the court for decision and determination is the validity or invalidation of the said section 5 of ordinance 18,407, and upon which judgment shall be had either by plaintiff or defendant, as the court may find. Section 5, ordinance 18,407, as set out herein, may be considered in evidence for the purpose of this case."

Plaintiff in error was adjudged guilty in the police court and fined one hundred dollars, appealed to the St. Louis Court of Criminal Correction where, upon a trial *de novo*, he was again convicted and the same fine imposed.

In the trial courts plaintiff in error moved to quash the information filed against him, and as grounds for his motions assigned, among others, the following specific reason:

"Because said section 5 is void, being in violation of the XIV Amendment to the Constitution of the United States in that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" (Abstract, pages 10, 13.)

The cause was appealed to the Supreme Court of the State of Missouri and there plaintiff in error

again urged among other reasons for a reversal of the judgment of the lower court that:

> "The ordinance violates the XIV Amendment to the Constitution of the United States:
>
> "Because it discriminates between persons of the same class and tends to create a monopoly,
>
> "Because it deprives persons of their property without due process of law,
>
> "Because it denies to persons within its jurisdiction the equal protection of the law,
>
> "Because it is not a valid police regulation, but tends to the destruction of a lawful business." (Abstract, page 17.)

The supreme court affirmed the judgment of the lower courts and decided:

That the city of St. Louis had the absolute power to prohibit the erection or maintainance of a dairy within its corporate limits (Abstract, page 20);

That the ordinance is a valid police regulation (Abstract, page 21);

That the ordinance does not violate the XIV Amendment to the Constitution of the United States (Abstract, page 21).

Plaintiff filed his motion for a rehearing of the cause, and urged that the Supreme Court of Missouri had overlooked the authorities cited to sustain the argument that the ordinance in question violated the XIV Amendment to the Constitution of the United States.

This motion was overruled, and the cause comes to this court by writ of error.

BRIEF.

I.

In a suit brought to this court from a state court, which involves the constitutionality of ordinances made by a municipal corporation, this court will, when necessary, put its own independent construction upon the ordinances.

Yick Wo vs. Hopkins, 118 U. S. 356, 366;
Minnesota vs. Barber, 136 U. S. 313.

II.

An ordinance which denies to a person the right to engage in a lawful business or occupation followed and engaged in by others, deprives such person of his property and liberty without due process of law, abridges his privileges and denies him the equal protection of the laws, contrary to the provisions of the XIV Amendment to the Constitution of the United States, and is void.

Yick Wo vs. Hopkins, 118 U. S. 356;
In re Hong Wah, 82 Fed. 623;
In re Tie Lay, 26 Fed. 611, 615;
Barthet vs. City of New Orleans, 24 Fed. 563, 566;
In re Quong Woo, 13 Fed. 229;
City of Newton vs. Belger, 143 Mass. 598;
Tugman vs. City of Chicago, 78 Ill. 405;
Mayor vs. Thorne, 7 Paige, 261;
St. Louis vs. Dorr, 145 Mo. 466.

III.

An ordinance which treats a lawful business and occupation, irrespective of location or the manner in which it is carried on, as a nuisance and tends to suppress such business, denies to the person or persons carrying on such business the equal protection of the law and tends to create a monopoly, and is void as conflicting with the XIV Amendment to the United States Constitution.

Yick Wo vs. Hopkins, 118 U. S. 356;
The Stockton Laundry Case, 26 Fed. Rep. 611–614;
State vs. Mahner, 43 La. Ann. 496;
Yates vs. Milwaukee, 10 Wall. 497.

IV.

Under the decision of the Supreme Court of the State of Missouri the scope, purpose and effect of this ordinance is to compel the dairymen of St. Louis to move their business outside the limits of the city whenever by circumstances they are compelled to leave the premises upon which their dairies and cow stables were in operation at the time the ordinance went into effect. Such an ordinance tends to destroy a lawful occupation and business and conflicts with the XIV Amendment to the United States Constitution.

Yick Wo vs. Hopkins, 118 U. S. 356;
The Stockton Laundry Case, 26 Fed. Rep. 611–614.

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V.

The police power of the state extends only to the regulation of the pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community.

In re Jacobs, 98 N. Y. 98;
Barthet vs. City of New Orleans, 24 Fed. 563;
In re Andrew Frazee, 63 Mich. 396;
Mayor vs. Radecke, 49 Md. 217;
State vs. Tenant, 110 N. C. 609;
City vs. Dudley, 129 Ind. 112;
Anderson vs. City, 40 Kan. 173.

ARGUMENT.

I.—The plain terms and language of the ordinance complained of preclude the idea of a proper and valid police regulation.

It undertakes to permit the maintenance in any and every part of the city of St. Louis, in densely populated neighborhoods as well as in the open territory near the city limits. Any one, irrespective of qualifications, can engage in the business as long as he is able to procure the consent of the municipal assembly. The question of who is to be a dairyman and where the dairy is to be located is in each particular case left to depend upon the mere will and caprice of a majority of the men constituting the municipal assembly. A dairy may be maintained in a crowded and densely built up neighborhood, and the right to maintain such dairy in a strip of territory especially adapted by its environments for the business may be refused, simply because the assembly see fit to so ordain.

The Supreme Court of Missouri very frankly say in their opinion (Abstract, pages 19, 20) that the city of St. Louis has the right to define limits within which no dairy shall be established, and to make these limits co-extensive with the limits of the city.

This decision makes the scope and purpose of the ordinance plain. If the municipal assembly will refuse permits for the establishment of new dairies, the

removal of old ones (as in this case) from a certain location to a more favorable one, the re-establishment of a dairy once abandoned, the erection of cow stables and dairy buildings on a piece of property in a sparsely settled district to which a dairyman is compelled to remove by reason that the district in which he has carried on his business is becoming densely populated and real estate too valuable for dairy purposes, then, by force of circumstances, the number of dairies within the corporate limits would gradually but steadily be reduced until all were gone. The city would, by slow process, accomplish that purpose with regard to her dairies which cities like San Francisco have for years sought to accomplish by similar legislation with regard to their laundries.

In one instance the process operates directly, in the other indirectly, but always to accomplish the same unlawful purpose—the suppression and destruction of a lawful and necessary business, and the oppression of a certain class of citizens in the use and enjoyment of their property.

There can be nothing to prevent the municipality from suppressing every dairy which may be adjudicated a nuisance by a court of competent jurisdiction, and as to the dairies now existing the natural presumption is that they are harmless.

The ordinance may be as prejudicial to the community at large as to the dairymen. Under its provisions even the most densely settled block in the

city might have to tolerate a cow stable at the pleasure of an irresponsible municipal assembly.

Nothing we can say on the subject could add to the plain language leveled against similar legislation by this court in the cases cited in our brief.

II.—In the present case the plaintiff in error was, at the time of the commission of the alleged offense, the owner of the property with reference to which the offense is alleged to have been committed.

He owned the real estate, equipped with buildings and stable, and had owned a dairy business in St. Louis for years. On May 5, 1898, he placed his cows in the stable of the property mentioned in the complaint, and began to operate his dairy business from those premises.

Why do these acts make him guilty of an offense? Because he did not procure "the permission of the municipal assembly so to do."

Similar attempts to curtail the use of property and the exercise of the right to choose and follow a harmless and lawful occupation upon equal terms with others by conferring upon "municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected, for the carrying on of the business" have been repeatedly condemned

by this court, and in the case of Yick Wo vs. Hopkins, 118 U. S. at page 370, the court say:

> "The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth may be a 'government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

Respectfully submitted,

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Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 62.

BERNARD SCHEFE,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS,
Defendant in Error.
} No. 18,573.

STATEMENT.

This case is similar to that of John G. Fischer, Plaintiff in Error, vs. The City of St. Louis, Defendant in Error (No. 18803), with which it is to be argued and submitted. The legal questions involved are the same and the facts are so nearly the same that the same brief and argument submitted in that case is reproduced hereafter for this case.

The only material difference in the facts (if it is a material difference) is that in the Fischer case the premises in question had at one time prior to the occupation of Fischer of the premises been used as a dairy, while in this (Schefe) case the premises in question had never been used as a dairy.

This case originated as a civil proceeding before a police court in the city of St. Louis, where the defendant (here plaintiff in error) was fined for a violation of ordinance No. 18407, hereinbelow set out.

Upon his appeal to the St. Louis Court of Criminal Correction the cause was tried *de novo* upon an agreed statement of facts, hereinafter set out, and the court again found the defendant (here plaintiff in error) guilty of a violation of said ordinance and he was fined one hundred dollars and costs. From this decision he appealed to the Supreme Court of Missouri (the court of last resort under the State law) where the decision of the lower court was affirmed in an opinion by the court in banc (reported as St. Louis vs. Schefe, 167, Missouri p. 666) and every contention of appellant ruled against him.

In all stages of the litigation plaintiff in error contended that said ordinance was void, amongst other reasons because in conflict with the Fourteenth Amendment of the United States Constitution and the case comes here on that ground, which is now the only point open for discussion.

The defendant in error is a municipal corporation organized in pursuance of the provisions of the Constitution of Missouri set out therein in Article 9, sections 20 to 25, (to be found in Revised Statutes of Missouri, 1899, pages 102 and 103, slightly amended in particulars immaterial here in 1901), which provisions granted to St. Louis the right to adopt a Charter subject only to the limitations that it should be subject to and in harmony with the Constitution and Laws of the State.

Of such a Charter the Constitution provides the courts take judicial notice (Constitution of Missouri, Article IX, section 21).

Pursuant to this grant of power, the people of St. Louis adopted its present Charter, which took effect October 22,

1876, and which has all the force and effect of a Charter emanating from the General Assembly, and which amongst other things, gave it the power by ordinance enacted through its Mayor and Municipal Assembly (the latter consisting of a upper house or Council, and a lower house or House of Delegates):

> "to secure the general health of the inhabitants by any measure necessary * * * to *prohibit the erection* of soap factories, stock-yards and slaughter houses, pig pens, *cow-stables* and *dairies*, coal oil and vitriol factories within prescribed limits, and to remove and *regulate the same;* and to regulate or prevent the carrying on of any *business* which *may be dangerous or detrimental to the public health,* * * * and to declare, prevent and abate *nuisances on public or private property* and the causes thereof. * * *" (Charter of St. Louis, Article III, section 26, subdivision sixth.)
>
> Also, "finally, to pass all such ordinances not inconsistent with the provisions of the Charter, or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city * * * and to enforce the same by fines and penalties not exceeding five hundred dollars and by forfeitures not exceeding one thousand dollars." (Charter, Article III, section 26, subdivision fourteenth.

In pursuance of the above enumerated powers (especially Article III, section 26, subdivision sixth) the city duly enacted said ordinance, numbered 18407, approved April 6, 1896. The fifth section of said ordinance only is here attacked, hence we reproduce here only the title of the ordinance, and section fifth thereof, which are as follows:

> "An ordinance to regulate cow stables and dairies within the corporate limits of the City of St. Louis, prescribing how they may be maintained, defining when they shall be deemed a nuisance, providing for their inspection by veterinary surgeons and sanitary officers, and fixing the salaries of the veterinary surgeons. Also,

to repeal section four hundred and eleven of article eleven, chapter fourteen, and section three hundred and seventy-three, of article eight of chapter fourteen of the revised ordinances of the City of St. Louis of one thousand eight hundred and ninety-three.

Sec. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the Municipal Assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the Municipal Assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars."

The case was tried upon an agreed statement of facts in all the State courts, which is as follows:

"The plaintiff, the city of St. Louis, is a municipal corporation organized and existing under the laws of the state of Missouri, and defendant is owner and occupant of 3012 Osage street, St. Louis, Missouri, upon which was located on the 5th day of May, 1898, a dwelling and frame stable, which said stable had been erected and built prior to the ownership and occupancy of premises by defendant.

"Defendant, who was at the time a dairyman of several years' standing in the said city, did on or about the 5th of May, 1898, place in said stable a number of cows, and did proceed to conduct upon said premises a dairy, and produce and sell milk therefrom and was doing so at the time of commencement of action in First District Police Court. That defendant commenced the operation of said dairy establishment on or about the aforesaid date without having obtained permission to do so from the Municipal Assembly by ordinance, and defendant did maintain on said premises a dairy and stable without permission.

"Said dairy and stable was not in operation upon said premises at the time of the approval of Ordinance 18407, on April 6, 1898, said Section 5 of said Ordinance 18407 being as follows:

"Section 5. No dairy or cow-stable shall hereafter be erected, built or established within the limits of this city, without having first obtained permission so to do from the Municipal Assembly, by proper ordinance, and no dairy or cow-stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the Municipal Assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.

"That no question of nuisance or no nuisance shall be considered in this case;

"It being hereby distinctly understood, agreed and stipulated that the issue and question submitted to the court for decision and determination is the validity or invalidation of the said Section 5, of Ordinance 18407, and upon which judgment shall be had either by plaintiff or defendant, as the Court may find. Section 5, Ordinance 18407, as set out herein, may be considered in evidence for the purpose of this case."

The plaintiff in error now brings the cause here to review the decision of the Supreme Court of Missouri as hereinbefore stated, on the ground that said ordinance is unconstitutional because in conflict with that part of section one of the Fourteenth Amendment of the Constitution of the United States, which provides as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

BRIEF.

I.

(a) No question is open for the consideration of this court save whether the ordinance in question violates the Fourteenth Amendment to the United States Constitution. On all other points the plaintiff in error is concluded by the ruling of the State Supreme Court.

Barbier vs. Connolly, 113 U. S. 27, 29, 30, 32.
Wilson vs. Eureka, 173 U. S. 32, 35.
Crowley vs. Christensen, 137 U. S. 86, 92, 94.
Gundling vs. Chicago, 177 U. S. 183, 185.

(b) The only ground upon which plaintiff in error can plausibly urge the alleged unconstitutionality of the ordinance is his contention that it confers arbitrary power on the municipal assembly to grant or refuse permission to operate a dairy. And as to this the plaintiff in error is not in a position to raise the question. He made no application for a permit or license and of course has not been refused one. *Non constat* that the assembly would have refused an application. Whether the discretion of the assembly is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused permission.

Gundling vs. Chicago, 177 U. S. 183, 186.

II.

(a) But, assuming that the question may be raised by plaintiff in error, the requirement of the ordinance that he,

like every other person similarly situated, must first obtain the permission of the Municipal Assembly before establishing or maintaining a dairy within the limits of the City of St. Louis, does not operate as a violation of the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

Gundling vs. Chicago, 177 U. S. 183, 186.
Wilson vs. Eureka, 173 U. S. 32 and cases there cited.
Davis vs. Massachusetts, 167 U. S. 43, 48.
St. Louis vs. Galt, 77 Southwestern (Missouri Sup. Court, Nov. 25, 1903) 876, 879.
St. Louis vs. Fischer, 167 Mo. 654, 664.
Ex parte Fiske, 72 Cal. 124, 126 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356).
Slaughter House Cases, 16 Wallace 36, 80.
Barbier vs. Connolly, 113 U. S. 27, 32.
Crowley vs. Christensen, 137 U. S. 86 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356, on grounds in point here).

(b) The charter provisions (which are perfectly lawful—see Point III) confer on the city *express* power to *prohibit* altogether the erection or maintenance of cow stables and dairies as well as to remove and *regulate* the same. Under these provisions it is competent to impose, instead of absolute prohibition, the lesser restriction, upon all persons desiring to erect or maintain a dairy, of first obtaining permission so to do from the municipal assembly and mayor by ordinance. The maintenance of dairies and cow stables within the city limits is not an absolute right, but a privilege, and whether under the individual circumstances of each case the operation of a dairy in the particular locality may be advantageous or injurious to

the public is a question the determination of which is properly left to the discretion of the Municipal Assembly, and the ordinance is not for that reason void as conferring an arbitrary and unregulated power.

Wilson vs. Eureka, 173 U. S. 32, 35-37.

Davis vs. Massachusetts, 167 U. S. 43, 48 ("The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater includes the less." p. 48.)

St. Louis vs. Fischer, 167 Mo. 654, 662.

Gundling vs. Chicago, 177 U. S. 183, 186-188.

Crowley vs. Christensen, 137 U. S. 86, 92 (distinguishing Yick Wo vs. Hopkins, 118 U. S. 356, on grounds applicable to this case).

Commonwealth vs. Parks, 155 Mass. 531, 532 ("What a municipality may forbid altogether, it may forbid conditionally, unless its written permission is obtained beforehand").

Quincy vs. Kennard, 151 Mass. 563 (prohibiting keeping of swine without the permission of the board of health first obtained).

In re Flaherty, 105 Cal. 558, 562.

Ex parte Fiske, 72 Cal. 124, 127-128.

Easton vs. Covey, 74 Md. 262 (distinguishing Mayor vs. Radecke 49 Md.) relied on by plaintiff in error.

Love vs. Judge, 128 Mich. 545 (distinguishing the Frazee case, 63 Mich. 396, relied on by plaintiff in error).

St. Louis vs. Howard, 119 Mo. 47.

St. Louis vs. Weber, 44 Mo. 547, 550.

State *ex rel* vs. Holt, 39 Mo. 521, 524.

Perry vs. Salt Lake, 7 Utah 143; s. c. 11 Lawy. Rep. An. 446.

Hine vs. New Haven, 40 Conn. 478.
Commonwealth vs. Davis, 162 Mass. 510.

See also State *ex rel* vs. Schweickardt, 109 Mo. 496, 514 (holding that under many circumstances privileges may be granted by statutes or ordinances to specified individuals without violating any constitutional privilege, and upholding an ordinance to that effect: p. 514).

(c) Where the determination of the question whether the pursuit of a certain occupation, which may or may not be a nuisance according to conditions and circumstances, is left to the discretion of the Municipal Assembly, the presumption is indulged by the courts that such body will make the proper investigation and act impartially, not that it will favor one and discriminate against another, or exercise its powers for purposes of profit or oppression. Such favorable presumptions are constantly indulged in regard to legislative action.

City of St. Louis vs. Fischer, 167 Mo. 654, 663.
City of St. Louis vs. Howard, 119 Mo. 47, 50.
In re Flaherty, 105 Cal. 558, 562.
Ex parte Fiske, 72 Cal. 125, 127.
Perry vs. Salt Lake City, 7 Utah 143; s. c. 11 Lawy. Rep. An. 446, 448.

See also Soon Hing vs. Crowley, 113 U. S. 703, 710 ("The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments").

(d) The possibility of the abuse of legislative power

does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist.

> Powell vs. Pennsylvania, 127 U. S. 678, 686.
> Williams vs. Mississippi, 170 U. S. 213, 225.
> Verdin vs. St. Louis, 131 Mo. 26, 130, per Sherwood, J., citing Powell vs. Pennsylvania *supra.*
> Crowley vs. Christensen, 137 U. S. 86 ("As in many other cases, the officers may not always exercise the power [to grant certain licenses] conferred on them, with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States": p. 91-92).

There must always be lodged somewhere and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage.

> Powell vs. Pennsylvania, *supra,* p. 685.
> Yick Wo vs. Hopkins, 118 U. S. 356, 370.

(e) There is no hint or suggestion that discrimination or injustice is, or is intended to be, exercised under the ordinance in question.

As it does not appear upon the face of the ordinance, or from any facts in evidence or of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, or that there is any unjust discrimination, the legislative determination of the questions

of public policy requiring its enactment is conclusive upon this court and forms no subject for Federal interference.

Powell vs. Pennsylvania, 127 U. S. 678, 684.
Gundling vs. Chicago, 177 U. S. 183, 187-188.
Capital City Dairy Co. vs. Ohio, 183 U. S. 238, 246.
State vs. Layton, 160 Mo. 474, 498.

III.

(a) The ordinance in question is a valid exercise of the police power expressly delegated by the State to the City. The Fourteenth Amendment was not designed to interfere with the exercise of the police power by the States, and nothing in that amendment has shorn the States of their police power to prohibit or regulate trades and occupations which are or may be unwholesome, nor of regulating the use of property so as to guard against a use which is injurious to the community.

Davis vs. Massachusetts, 167 U. S. 43, 47.
St. Louis vs. Fischer, 167 Mo. 654, 664.
Slaughter House Cases, 16 Wallace, 36, 62, 81.
Powell vs. Pennsylvania, 127 U. S. 678, 683.
Holden vs. Hardy, 169 U. S. 366, 392.

(b) The establishment and operation of dairies and cow stables within the limits of a crowded metropolis is the pursuit of an occupation that is not necessarily harmless and unobnoxious in its nature, but one that may be or may become offensive, obnoxious and unsanitary to the community; its prohibition (*a fortiori* regulation) is within the police powers of the State, which the State may, and in this case has, delegated to the municipality. Even if the power had not been conferred (as it has been) by

express provision of the Charter, yet the ordinance in question would have been a valid exercise of the Police Power under the General Welfare Clause (Art. III, sec. 26, par. 14). The police power is universally conceded to include everything essential to the public safety, health, comfort and morals; and beyond this the State may interfere wherever the public interests require it, and in this particular (while its determination of what is a proper exercise of the police powers is not conclusive, but subject to judicial supervision) a large discretion is necessarily vested in the legislative body to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, nor to confiscate property under the guise of a police law, yet a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice not only in the subject matter, but in the means employed.

Lawton vs. Steele, 152 U. S. 133, 136, 140.

Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.

St. Louis vs. Galt, 77 Southwestern 876, 879 (Sup. Court Missouri, Nov. 25, 1903, not yet officially reported).

State vs. Broadbelt, 89 Md. 565, 577, 586 (upholding police regulations as to dairies and discussing numerous authorities, State and Federal).

Ferrenbach vs. Turner, 86 Mo. 416, 420 ("The courts ought not to interfere with municipal bodies in the legitimate exercise of those powers by which the peace, health and comfort of the inhabitants are secured," p. 421).

Crowley vs. Christensen, 137 U. S. 86, 89 (See also p. 91 "A business attended with danger to the community may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on. * * * It is a matter of legislative will only").

Gundling vs. Chicago, 177 U. S. 183 (p. 188: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power of the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference").

In re Linehan, 72 Cal. 114 ("The necessity of legislation to restrict the unlimited herding of swine and cows in thickly populated districts is too apparent to need argument. Keeping swine or cows is, or may be, an occupation; and within certain limits may be detrimental to health and dangerous to public safety," p. 116).

Tiedeman on State and Federal Control of Persons and Property (1900), vol. 2, p. 730, sec. 145 (pointing out that the legislature may prohibit acts or trades as unwholesome or annoying, which the courts in the absence of statutes would hold permissible; and that "granting that the act or trade produces discomfort or injury to health, it is ultimately a legislative question whether the public welfare requires the imposition of this burden." Dairies are within this range: *ib.* p. 731).

Parker and Worthington on Public Health and Safety (1892), sec. 254, pp. 291-292: ("The power of the governing authorities, even in respect of noxious and offensive trades, extends further than such means of regulating them; they may be entirely prohibited within the corporate limits, though it is doubtful if such entire prohibition would be permissible under an authority merely to 'regulate' unless the trades or occupations constitute nuisances in fact. There is no doubt, however, that even under such a grant it would be a reasonable and proper *regulation* to prohibit the carrying on, without the consent of the local authorities of any trade or occupation which however lawful and innocuous in itself *may become* in its ordinary exercise a public nuisance.")

(c) Stricter police regulations are essential to the welfare and safety of a crowded metropolis than are required in the sparsely peopled portions of the country, and which would be wholly unnecessary and intolerable in the latter. Every man who selects urban life necessarily gives up cer-

tain natural rights that would pertain to life in the country.

St. Louis vs. Galt, *supra.*
Ex parte Cheney, 90 Cal. 617, 620.

"The tendency of modern development is in the direction of greater rather than more restricted police power, and necessarily so in order to meet the new dangers and increase of old dangers constantly occurring as natural incidents of advancing civilization."

Valliant, J., in Westport vs. Mulholland, 159 Mo. 86, 94, quoting from a Wisconsin opinion.

"Changing civic conditions will justify the permission of an evil or nuisance at one time, and call for its suppression at a later day. * * * The same experience is met with in the keeping of cows, pigs, and other animals in small towns, on the premises of one's dwelling. This may be permitted in a town which is sparsely settled and large yards surrounding each dwelling, without endangering the public health to any very serious degree. But when the town becomes more thickly settled, and the large grounds are fast being divided into twenty-foot lots, the keeping of such animals on the premises becomes a serious nuisance, which may be restricted or prohibited altogether."

Tiedeman on State and Federal Control of Persons and Property (1900), Vol. 2, pp. 730, 731.

ARGUMENT.

Constitutionality of Ordinance Is the Only Question.

The ordinance in question was upheld against every contention made by the plaintiff in error by the highest tribunal in the State. This puts to rest every point raised except the unconstitutionality of the ordinance on the ground of its violation of the Fourteenth Amendment.

This court will therefore not consider the contention that the ordinance does not apply to the premises in question, which at one time had been used by another than plaintiff in error for dairy purposes with permission by the Assembly, but were then abandoned for dairy purposes for six months, and thereafter were sought to be occupied by plaintiff in error again for a dairy without a new permit, he simply moving his cows there from another locality. The State court held that once having been abandoned, the status as dairy premises was lost and could not be restored without permission anew (167 Mo. 665). Even if this ruling were reviewable, it is so obviously correct (since the conditions and surroundings may meanwhile have changed) that it requires no argument in this court.

The same is true as to the proper interpretation of the Charter on the point whether the authority therein given to prohibit "within prescribed limits" may extend to the entire city limits. The interpretation of the State court on this point is obviously correct, but at all events is not a subject for review here.

So, also, for the same reasons the question whether there is a delegation to the municipality of the State power to

prohibit or regulate the operation of dairies, is not here open for argument.

There is nothing for this court therefore except to say whether the ordinance is in violation of the Fourteenth Amendment (and even on that point it is debatable whether plaintiff in error can be heard, since he has never been denied permission by the Assembly—see Point I of antecedent brief).

Dignity of the Ordinance as a Law.

In discussing the constitutionality of this ordinance it is to be borne in mind that the same principles and considerations apply as in the case of a statute passed by the State legislature.

As appears in our statement, the State Constitution provides for the organization of the City of St. Louis by charter; the Charter provisions (except if inconsistent with the Constitution or laws of the State, which, as decided by the State Supreme Court, is not the case here, and which decision is conclusive on that point), are direct delegations of State power to the municipality, and the ordinances enacted by the Municipal Assembly in pursuance thereof, so long as they are in the legitimate sphere of municipal affairs, are entitled to the same force and effect and the same intendments and discretionary scope as are accorded to enactments of the General Assembly.

> St. Louis vs. Foster, 52 Mo. 513 (where the court says, p. 515: "A city council is a miniature general assembly, and their authorized ordinances have the force of laws, passed by the legislature of the State.")
>
> Verdin vs. St. Louis, 131 Mo. 26, 117-118 (Sher-

wood, J., quoting the last extract, and referring to other similar decisions placing ordinances and statutes on the same plane, on these questions).
Barber Asphalt Co. vs. French, 158 Mo. 534, 547 (affirmed 181 U. S. 324).
St. Louis vs. Fischer, 167 Mo. 654, 660.
Kansas City vs. Oil Co., 140 Mo. 458, 467 *et seq.*
State ex rel vs. Lindell Ry., 151 Mo. 162.

The Ordinance Is a Valid Police Law.

We defer for a moment the consideration of the charge that the *manner* of the regulation or *quasi* prohibition provided in this ordinance confers unregulated arbitrary power on the Municipal Assembly not warranted by law, in order to first call attention that the *right itself* of the State (here acting through the city) to regulate, and even, if the point were involved here, to prohibit altogether, *within the limits of the city*, the operation of dairies, admits of little doubt. The authority in the Charter is conferred in the same clause which refers to subjects of a similar nature—"soap factories, stock-yards, slaughter houses, coal oil and vitriol factories," etc., and suppression of nuisances. The ordinance is within the legitimate exercise of the Police Power of the State in protecting the health, comfort and safety of its citizens.

The maxim *sic utere tuo ut alienum non laedas* may apply with full force to the maintenance and operation of dairies and cow stables within the limits of a populous city.

It is an occupation the pursuit of which is not necessarily harmless, inoffensive and sanitary in its effects on the community. Without stopping to elaborate details it is at once suggested to the mind that the conditions inseparable

from such pursuit may, especially in a city, be not only obnoxious and offensive to the physical senses, but may under many probable circumstances engender disease and facilitate its dissemination amongst the people.

It is claimed that dairies and cow stables are not nuisances *per se* and therefore cannot be prohibited by ordinance as if they were nuisances. But it cannot be disputed that it is within the power of the State to prohibit the carrying on of any trade or business which, while not in itself a nuisance, may become such or may be of such a character as to be or become obnoxious to the neighborhood.

Thus in the case of Linehan, 72 Cal. 114, on p. 116, the court says:

> "Subjects to Constitutional limitations, legislative authority extends to the suppression or regulation of those things which are hurtful to the general good, and, as a general rule, *the law making power will be deemed the exclusive judge of what is or is not hurtful.* The necessity of legislation to restrict the unlimited herding of swine and cows in thickly populated districts is too apparent to need argument. Keeping swine or cows is, or may be, an occupation; and within certain limits, may be detrimental to health and dangerous to the public safety."

So Professor Tiedeman in his late work on State and Federal Control of Persons and Property (1900), vol. 2, pp. 730-731, says that "through the interference of the *legislature* the doing of acts may be prohibited on the ground of being nuisances, which otherwise have been held to be permissible because of the public benefit resulting from thse acts." And he also adds that though the *courts,*

independently of statute, may determine that the public benefit from a certain unwholesome or annoying trade far outweighs the personal discomfort or injury to health which attends the prosecution of the trade, and for that reason refuse to prohibit its operation, that yet "the *legislature* is not precluded from reaching a different conclusion. Granting that the act or trade produces discomfort or injury to health, it is ultimately a *legislative* question whether the public welfare requires the imposition of this burden. No one has a natural right to do that which injures another. It is quite a common experience for the legislature either to prohibit altogether or to regulate the doing of that which works an annoyance or injury to others." And again, on p. 731, he cites the very instance here in question: "But when the town becomes more thickly settled and the large grounds are fast being divided up into twenty-foot lots the keeping of such animals [i. e., cows, pigs, etc.] on the premises becomes a serious nuisance, which may be restricted or *prohibited altogether,* according to the demands of public opinion."

Parker & Worthington on Public Health and Safety (1892) say in sec. 254, pages 291-292: "But the power of the governing authorities, even in respect of noxious and offensive trades, extends further than such means of regulating them; they may be *entirely prohibited within the corporate limits,* though it is doubtful if such entire prohibition would be permissible under an authority merely to 'regulate,' unless the occupations constitute nuisances in fact. There is no doubt, however, that even under such a grant of authority it would be a reasonable and proper *regulation* to prohibit the carrying on, *without the consent of the proper local authorities,* of any trade or occupation which, however lawful and innocuous in itself, *may become in its ordinary exercise a public nuisance.*"

A reference to the decisions of this court shows not only that they recognize fully the right of the State to enact such Police Laws as above and here in question, but also that in cases not clearly falling within the ordinary Police Power, this court will yet, where the object sought to be accomplished is conducive to the public interest, accord to the legislative body a large discretion and liberty of choice to determine what the interests of the public require and what measures are necessary for the protection of such interests, and uphold the same unless so unreasonable and extravagant as to unnecessarily and arbitrarily interfere or destroy without due process of law the personal rights or property of the citizen.

Lawton vs. Steele, 152 U. S. 133, 136, 140.
Powell vs. Pennsylvania, 127 U. S. 678, 685, 686.
Gundling vs. Chicago, 177 U. S. 183, 188.
Crowley vs. Christensen, 137 U. S. 86, 89, 91.

The ordinance in question was therefore clearly within the police power of the city conferred by law on it, and the only contention that need be noticed is that the *manner* of its exercise (calling for permission in each case to be granted by the Municipal Assembly before the establishment or operation of dairies or cow stables becomes lawful), confers such unlimited and arbitrary power on the Assembly as to operate as a violation of the Constitution in denying the equal protection of the laws. It is argued that the Assembly may under the ordinance arbitrarily grant to A what it denies to B under the same circumstances, and thus unjustly favor one and discriminate against another, without any common measure applicable to all.

The means employed in the ordinance are Constitutional—not arbitrary nor unreasonable.

As to this point the authorities last referred to are also in point. "If the object to be accomplished is conducive to the public interests, the legislature may exercise a large liberty of choice as to the means employed."

Lawton vs. Steele, 152 U. S., on p. 140.

Again, what this court has said in another case may not be improper in view of the contention here made of Fischer and Schefe:

> "The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property; and while, according to the principles upon which our institutions rest 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself,' yet 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage.'"

Powell vs. Pennsylvania, 127 U. S., pp. 685-686, quoting from Yick Wo vs. Hopkins 118 U. S., upon which our opponents principally rely.

In the same case the court goes on:

> "It is argued, in behalf of defendant, that if the statute in question is sustained as a valid exercise of legislative power then nothing stands in the way of the destruction of the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not

disprove its existence. That possibility exists even in reference to powers that are conceded to exist."

See further authorities Brief, Point II (d).

The plaintiff in error has not shown nor pretended to claim that any improper discrimination has been made or contemplated under this ordinance, and, as shown above, the courts are not going to supply a presumption to that effect, simply because of a possible abuse. On the contrary, the presumption is that the legislative body will act fairly and impartially and not for the purposes of profit and oppression. See numerous authorities so holding cited *ante* in our Brief Point II, subd. (c).

And as said by this court:

"The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments * * * And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

Soon Hing vs. Crowley, 113 U. S. 703, on pp. 710-711.

In another case where the argument was made that arbitrary power was vested in an officer, this court said:

"The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. As in many other cases, the officers may not always exercise the power

conferred upon them, with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State; nor is it one which can be brought under the cognizance of the courts of the United States."

Crowley vs. Christensen, 137 U. S., on pp. 91-92.

Other authorities to similar effect are cited *ante* in Brief.

Looking at the ordinance in question in the light of these general and reasonable rules of law, we think there can be no doubt that the discretion vested in the Assembly to permit or deny the privilege of conducting dairies and cow stables within the limits of the City of St. Louis is reasonable and proper, and should be upheld on the general principles above mentioned.

Coming now to more particular instances we find our contentions corroborated in a number of cases in which similar ordinances were upheld by this court against the insistence here made that they conferred arbitrary and unbridled authority on certain officers or bodies.

Necessarily "there must always be lodged somewhere, and in some person or body, the authority of final decision." (118 U. S., p. 370.)

Thus an ordinance was sustained as not in conflict with the Fourteenth Amendment which provided that no person should make any public address on any of the public grounds, except in accordance with a permit from the mayor.

Davis vs. Massachusetts, 167 U. S., 43.

Against the same contention that personal rights were submitted to the unrestrained discretion of a single individual and thereby removed from the domain of law, was upheld an ordinance prohibiting the moving of any building into or

upon any street or public place, without the written permission of the Mayor, President of the City Council or in their absence, a councillor.

> Wilson vs. Eureka City, 173 U. S. 32 (commenting upon a number of authorities).

So also objection on the same ground was overruled when made against an ordinance of the City of Chicago, which committed to the discretion of the Mayor the question whether a license should be issued or declined in each case for the sale of cigarettes.

> Gundling vs. Chicago, 177 U. S. 183 (distinguishing Yick Wo vs. Hopkins, on grounds equally applicable here).

A large number of other authorities, State and Federal, to the like effect are referred to in our Brief under Point II (b) and need not be repeated here.

Enough, we think, has been said to show the validity of this ordinance.

Cases cited for plaintiff in error distinguished.

The plaintiff in error thinks his position is supported by a number of cases, mainly by Yick Wo vs. Hopkins, 118 U. S. 356, Barthet vs. New Orleans, 24 Fed. 563, State vs. Mahner, 43 La. An. 496, *In re* Hong Wah, 82 Fed. 623, and Stockton Laundry Case, 26 Fed. 611. We think none of these cases support his contention as applied to the ordinance here in question.

In Yick Wo vs. Hopkins, an ordinance was condemned which prohibited the maintenance of laundries within the limits of San Francisco without first having obtained the

consent of the Supervisors of San Francisco, "except the same be located in a building constructed either of brick or stone."

One vital difference between the ordinance there considered and the one here in question is that in the former this court held that *there was no question of police regulation involved*. The court pointed out that the ordinance was not intended to guard against fire, or against danger or discomfort to the community; that the pursuit there inhibited in wooden houses was harmless and inoffensive and the police power was not in reality involved at all or only except as a manifest guise and pretext to furnish the supervisors an excuse to discriminate against the Chinese. In connection with this phase the court said:

> "We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinance in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The court also says:

> "The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

But the real decision in the case is based on the finding of the court that the ordinance was intended *solely* to exclude the Chinese and favor all others, and that the ordinance was being so applied.

In concluding the case the court says:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the said ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be

fair on its face and impartial in appearance, yet, if it is applied and administered by the public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson vs. Mayor, etc., of New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U. S. 275; *Ex parte* Va., 100 U. S. 339; Neal vs. Delaware, 103 U. S. 370, and Soon Hing vs. Crowley, 113 U. S. 703.

"The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. *No reason whatever,* except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their *harmless and useful occupation,* on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. * * *."

It at once strikes the mind that none of the essential features on which the court condemned that ordinance are present in the one here considered.

The case of Barthet vs. New Orleans is also distinguishable. There on an application for a temporary injunction, a Federal *nisi prius* judge held invalid an ordinance prohibiting the maintenance and operation of slaughter houses within certain limits of the city "except permission be granted by the council of the City of New Orleans."

In the first place it will be noted at once that there is a difference between that ordinance and the ordinance under discusssion. The ordinance we are considering prohibits cow stables and dairies without permission of the municipal assembly, *by ordinance*. This implies, of course, strict legislative action and concurrence by the mayor. The charter of the City of St. Louis provides how ordinances shall be enacted, and requires the concurrent action, not only of both branches of the municipal assembly, but also of the mayor. In the New Orleans case, slaughter houses were authorized to be maintained and operated only on *permission* of the council. This permission might be obtained otherwise than by legislative action; for instance, by mere resolution not requiring the concurrence of the executive, or perhaps by mere sanction given by the members of the council. In other words, the law-making body of the city undertook to delegate its powers of legislation to the members or individuals composing it. This would be in truth and in fact a delegation of legislative power *to others*. In the ordinance which is involved in this case, there is no delegation of the power which is delegated by the State to the Municipal Assembly of the City of St. Louis. The assembly is itself to determine by the usual proper legislation, that is by ordinance, when a cow stable or dairy may or may not be established and conducted. Thus the assembly is itself, and not through others, even though they be the very members of the body itself, exercising the power granted by the charter.

But the Barthet case was decided on other grounds.

Attention is called in the very opening sentence of the opinion to the fact the Article 258 of the Louisiana Constitution prohibits monopolies, and that Article 248 invests the City of New Orleans with power to regulate the slaughtering of cattle within its limits, provided no monopoly or exclusive privilege exists within the State. Attention is also called by the court to the fact that the plaintiff, acting under an ordinance of the City of New Orleans, invested large sums of money in the erection of buildings suitable for the slaughtering of cattle for food, and that after he had done so, and had *"in good faith acquired vested rights,"* the ordinance of the city was amended so as to make it unlawful to maintain slaughter houses within certain limits, embracing his, except upon permission granted by the council. The court holds that this amendment conflicts with the Louisiana State Constitution. The court says:

> "The city council has the right generally in the exercise of governmental powers such as belong to municipal corporations, to regulate the business of slaughtering animals for food," thus recognizing the rule for which we here contend, and then continues: "But under the articles 248 and 258, State Constitution—responsive as those articles are to a public sentiment long offended in this city by oppressive monopolies in the slaughtering of animals for food—it must be apparent that the city cannot directly or indirectly prohibit the business of this complainant under the pretense of exercising an ordinary governmental police power. It is clear that those articles were intended to prohibit all monopolies, and to limit rather than enlarge the police powers of the city in relation to slaughtering cattle, etc., and if the city can refuse to permit Barthet to carry on his business, it can adopt the same course with others. *By giving its permission to an individual or to a corporation, and refusing it to all others, a monopoly could be established by the favored suitor.*"

The foregoing indicates very plainly that the court recognized the general police power of the city, but concluded that it might be so abused as to create a monopoly, in violation of the State Constitution. So far as the court undertakes to suggest that the ordinance may be void, merely because the council might withhold permission from all but one favored applicant, and thus create a monopoly, it comes into conflict with the decisions of this court that an ordinance or law will not be held invalid simply because its provisions may be abused. Rather will the court indulge in the proper presumption that the law making body will, like all officers, act in good faith and upon the exercise of a proper judgment and discretion, than that it will take advantage of its powers and abuse them. If any presumption is to be indulged in, in connection with the ordinance here attacked, it is that the municipal assembly will, by ordinance, grant permission for the erection or maintenance of dairies or cow stables in all proper cases, and will withhold such permission whenever it would operate injuriously on the rights of others.

State vs. Mahner, 43 La. An. 496 is another of the cases principally relied on in attacking the ordinance. That case differs from this because here express power to prohibit dairies altogether is conferred on the city, and the ordinance now in question is a police regulation in the public interest. In the Louisiana case the court based its decision on the ground that that ordinance "was not enacted in the interest of the public health," nor did the court "consider the right or power of the city to *prohibit* dairies within the city limits." "The permission to keep dairies within the limits negatived the view that the ordinance was enacted in the interests of the public health." There was in that case no right to prohibit *in toto*.

At all events if the case were in point it would not be in ac-

cord with the decisions of this court and many others including Missouri.

> The case of *In re* Hang Wah, 82 Fed., 623, is one in which the court (as in Yick Wo vs. Hopkins) found that there was no reasonable ground to invoke any police regulations, the vocation there inhibited in certain localities (the laundry business) being held to be necessarily harmless and inoffensive and not furnishing any basis for the regulation attempted, and that no question of the exercise of the police power was therefore involved.
>
> The Stockton Laundry Case, 26 Fed., 611, is distinguishable on the same ground. This is apparent from what the court says (p. 611), speaking of the laundries prohibited under the ordinance: "All must go, safe or unsafe, healthy or unhealthy, offensive or not offensive. It makes no difference what the character of the work is."
>
> It is evident that these cases are wholly different in their facts and the spirit of the ordinance, from the one at bar.

Many other of the authorities of plaintiff in error have been distinguished in later cases on grounds equally applicable here, some instances of which are indicated in the citations in our Brief. It is always well to remember that each case involving the validity of a police regulation depends largely on its own circumstances; for, as has been said, "It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict than that which deals with the taxing and police powers." (170 U. S. 45; 158 Mo. 540).

The ordinance in question here is a bona fide police regulation, duly authorized by the Charter; and in view of its manifest purpose when interpreted in the light of the prevailing conditions, it is absolutely justifiable.

We submit the decision of the Supreme Court of Missouri was right and should be affirmed.

Respectfully submitted,

CHAS. W. BATES,
WM. F. WOERNER,
CHAS. R. SKINKER,
For Defendant in Error.

See page 5.

Supreme Court of the United States.

No. 204.—October Term, 1903.

John G. Fischer, Plaintiff in Error, vs. The City of St. Louis. } On writ of error to the Supreme Court of the State of Missouri.

[May 16, 1904.]

This proceeding was originally instituted by a criminal complaint filed by the city of St. Louis against Fischer in the Police Court for a violation of an ordinance of the city in erecting, building and establishing on certain premises occupied by Fischer, at Nos. 7208 and 7210 North Broadway, a dairy and cow stable without first having obtained permission so to do from the municipal assembly by proper ordinance, and for maintaining such dairy and cow stable without permission of such assembly.

Motion was made to quash the complaint upon the ground, amongst others, that section 5 of the ordinance under which the conviction was held was in violation of the Fourteenth Amendment of the Constitution of the United States.

The case was submitted to the court upon the following agreed statement of the facts:

"The plaintiff, the City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable, which had been erected and built prior to the occupancy of said premises by defendant."

"At the time of the approval of ordinance No. 18,407, of said city and State, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant, for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and State. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway *were abandoned* as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for *residence purposes only*, and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue,

said city, on to premises Nos. 7208 and 7210 North Broadway, said city, placed them in an old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said sixteenth day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance, as provided by section 5 of ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896," a copy of which section is given in the margin.*

Upon this state of facts defendant was convicted and fined. An appeal was granted to the St. Louis Court of Criminal Correction, which affirmed the judgment. An appeal was then taken to the Supreme Court of the State, where the judgment was again affirmed. (167 Mo. 654.)

Mr. Justice BROWN delivered the opinion of the Court.

The authority of the city of St. Louis to adopt the ordinance in question is found in the Revised Statutes of the State, (1899, pp. 2486 and 2488,) which declares: "The mayor and assembly shall have power, within the city, by ordinance not inconsistent with the Constitution, or any law of this State, or of this charter, . . . to . . . prohibit the erection of . . . cow stables and dairies . . . within prescribed limits, and to remove and regulate the same."

"Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or of the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars and by forfeitures not exceeding one thousand dollars."

The authority of the municipality of St. Louis, under this charter, to adopt the ordinance in question was settled by the decision of the Supreme Court, and is not open to attack here.

Considerable stress is laid upon the fact that at the time the ordinance was adopted, (April 6, 1896,) the dairy and cow stable had already been erected and at that time was occupied and in use for that purpose, though such use was subsequently abandoned and the premises used as a private resi-

* SEC. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred nor more than five hundred dollars.

dence for a short time, when defendant moved his cattle there and established anew the dairy and cow stable which had theretofore been used. The Supreme Court, however, found that defendant was guilty of maintaining a dairy and cow stable within the meaning of the ordinance without permission of the municipal assembly, and as this construction of the ordinance involves no Federal question, we are relieved from the necessity of considering it.

Defendant's objection to the ordinance, that it is made to apply to the whole city when authority was only given by the charter to prohibit the erection of cow stables and dairies "within prescribed limits," is equally without foundation. If it were possible to prescribe limits for the operation of the ordinance it was held by the Supreme Court to be equally possible to declare that those limits should be coincident with the limits of the city. This is also a non-Federal question.

Defendant's main contention, however, is that, by vesting in the municipal assembly the power to permit the erection of dairy and cow stables to certain persons, a discrimination is thus declared in favor of such persons and against all other persons, and the equal protection of the laws denied to all the disfavored class. The power of the legislature to authorize its municipalities to regulate and suppress all such places or occupations as in its judgment are likely to be injurious to the health of its inhabitants or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question. The keeping of swine and cattle within the city or designated limits of the city has been declared in a number of cases to be within the police power. The keeping of cow stables and dairies is not only likely to be offensive to neighbors, but it is too often made an excuse for the supply of impure milk from cows which are fed upon unhealthful food, such as the refuse from distilleries, &c. (*In re Linehan*, 72 Cal. 114; *Quincy* v. *Kennard*, 151 Mass. 563; *Love* v. *Judge*, 128 Mich. 545.)

We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows and another fifty; where one desired to establish a stable in the heart of the city and another in the suburbs; or, where one was known to keep his stable in a filthy condition and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others. The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands

of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others, who for reasons totally disconnected with the merits of the case are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood. (*Crowley* v. *Christiansen*, 137 U. S. 86; *Davis* v. *Massachusetts*, 167 U. S. 43; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710.)

The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. This would operate with great hardship upon persons who desire to establish dairies and cow stables in the outskirts of the city, as well as inconvenience to the inhabitants, who to that extent would be limited in their supply of milk. It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. It has been held in some of the State courts to be contrary to the spirit of American institutions to vest this dispensing power in the hands of a single individual, (*Chicago* v. *Trotter*, 136 Ill. 430; *Matter of Frazee*, 63 Mich. 396; *State* v. *Fiske*, 9 R. I. 94; *Baltimore* v. *Radecke*, 49 Md. 217; *Sioux Falls* v. *Kirby*, 6 S. D. 62,) and in others that such authority cannot be delegated to the adjoining lot owners. (*St. Louis* v. *Russell*, 116 Mo. 248; *Ex parte Sing Lee*, 93 Cal. 354.) But the authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority, (*Quincy* v. *Kennard*, 151 Mass. 563; *Commonwealth* v. *Davis*, 162 Mass. 510,) and by this court the delegation of such power, even to a single individual, was sustained in *Wilson* v. *Eureka City*, (173 U. S. 32,) and *Gundling* v. *Chicago*, (177 U. S. 183.)

Whether the defendant be in a position to avail himself of the alleged invalidity of the ordinance without averring that he applied for and had been refused a permit to establish the dairy and cow stable in question, as was intimated in the latter case, is not necessary to a decision here, and we express no opinion upon the point.

It is sufficient for us to hold, as we do, that the ordinance in question

does not deprive the defendant of his property without due process of law, nor deny to him the equal protection of the laws.

The judgment of the Supreme Court of Missouri is, therefore,

Affirmed.

No. 62.

Bernard Schefe
vs.
The City of St. Louis.
} In error to the Supreme Court of the State of Missouri.

This case is similar to the last in every material particular, and, for the reasons stated in that case, is also

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.